Petition

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ALEXANDER L. STEVAS,
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81-2471

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Does Beck v. Alabama, 447 U. S. 625 (1980), require the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Supreme Court affirming Respondent's conviction and sentence, before the case was remanded to it from this Court, is reported as Ritter v. State, 375 So. 2d 270 (Ala. 1979), and is reproduced as Appendix H, hereto, pp. 47a - 69a, infra.[1]

2. The opinion of the Alabama Supreme Court reversing Respondent's conviction and sentence, after the case was remanded to it by this Court for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980), in Ritter v. State, No. 77-798 (Ala. May 8, 1981) (before rehearing), is not yet

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

reported, but it is reproduced as Appendix E, hereto, pp. 27a - 40a, infra.[2]

3. The extension of the opinion of the Alabama Supreme Court in response to the State's application for rehearing in Ritter v. State, No. 77-798 (Ala. June 12, 1981) (on rehearing), is not yet reported, but it is reproduced as Appendix B, hereto, pp. 3a - 21a, infra.

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[2]The June 30, 1980 order of this Court vacating the Alabama Supreme Court's prior judgment and remanding the case for further consideration in light of the Beck decision is reported as Ritter v. Alabama, 448 U.S. 903 (1980), and is reproduced as Appendix F, hereto, pp. 41a - 42a, infra.

JURISDICTION

The judgment of the Alabama Supreme Court which is sought to be reviewed was entered May 8, 1981.[3] See Appendix D, hereto, pp. 25a -26a, infra.

Petitioner's timely application for rehearing was denied in an order entered June 12, 1981.[4] See Appendix A, hereto, pp. 1a - 2a, infra. This petition is filed within sixty days of that denial, as permitted by Rule 20.4.

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[3]Pursuant to Alabama Rule of Appellate Procedure 41(a), the judgment entered on May 8, 1981 was not issued until after the rehearing application was denied.

[4]The court below extended its opinion in response to the rehearing application and dated an order denying that application on June 12, 1981. That order was not officially issued until July 7, 1981, but in any event, this petition is filed within sixty days of the date of the order denying rehearing (June 12, 1981).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution:

> "...nor shall any State deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

The Facts

In December of 1976, Respondent Wayne Eugene Ritter was released from an Indiana penitentiary on parole from a sentence for robbery. (Tr. 217, 293, 338)[5] While in

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[5]References to "Tr." are references to the two-volume record of Ritter's trial.

prison, he had met another inmate named John Louis Evans, and they had agreed that once released they would "jump parole" and go on a cross-country crime spree together. (Tr. 211, 322, 338) After leaving Indianapolis on Christmas Day, 1976, Ritter and Evans committed armed robberies in three different cities. (Tr. 323) They then went to Mobile, Alabama to commit another robbery. (Tr. 212, 324)

On January 5, 1977, in Mobile, Ritter and Evans robbed a pawn shop where Edward A. Nassar was employed. (Tr. 211-219, 324-325) During the robbery, Evans shot Nassar in the back while Nassar's seven-and nine-year old daughters watched. (Tr. 142, 215-219, 324-325) The bullet wound in Mr. Nassar's back killed him. (Tr. 211, 215, 219-220)

While Ritter did not fire the shot that killed Mr. Nassar, the only reason he did not shoot Nassar was because Evans was standing in his line of fire at the time. (Tr. 221, 340-341) Ritter and Evans had agreed beforehand that they would kill anyone they had to in one of their robberies, and when Mr. Nassar was shot, Ritter stood ready and willing to assist Evans in any way he could. (Tr. 220-221, 341) At the time Evans shot Mr. Nassar, Ritter had loaded a pistol he had gotten from Nassar, and Ritter would have shot Nassar if Evans had not been in the way. (Tr. 221, 347)[6] Ritter took the stolen

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[6]The Alabama Supreme Court held that Ritter was just as culpable in and responsible for the killing as Evans. Ritter v. State, 375 So. 2d 270, 274-275 (Ala. 1979), pp. 57a - 64a, infra.

pistol, and he and Evans ran out of the pawn shop and were seen by four or five witnesses. (Tr. 100-101, 131-133, 342)

In the two months after they murdered Nassar, Ritter and Evans committed numerous violent crimes, including more robberies, in a half dozen different states. (Tr. 326-329) They were finally apprehended in Arkansas by FBI agents on March 7, 1977. (Tr. 156-166) The pistol which Ritter had stolen during the robbery-murder of Mr. Nassar was found in Ritter's automobile at the time of his arrest. (Tr. 159-162, 220-221)

On March 8, 1977, after being advised of his rights, Ritter voluntarily confessed to the FBI his involvement in the robbery-murder of Mr. Nassar and the numerous other crimes which he had committed

while on the spree with Evans. (Tr. 171, 275-276, 293-312)

After waiving extradition, Ritter was transported to Mobile, Alabama, where, on March 11, 1977, after again waiving his rights, Ritter voluntarily confessed to Mobile Police Department officers his full involvement in the robbery and murder of Mr. Nassar. (Tr. 279-281)

The Trial Court Proceedings

On April 4, 1977, Ritter voluntarily appeared before the Mobile County Grand Jury, and against the advice of his attorney freely testified at length concerning his participation in the robbery and murder of Mr. Nassar and about the other crimes he and Evans had committed. (Tr. 24, 338-347) During that testimony, Ritter admitted all

of the elements of the capital offense consisting of the robbery and murder of Mr. Nassar. (Tr. 339-346)

Ritter told the grand jury that if he ever got free, he would probably go back to robbery and would kill again if necessary. (Tr. 344-345) He also told the grand jury that he intended to plead guilty at trial and wanted to be executed. (Tr. 345-346) Ritter gave the following explanation for why he did not plan to contest his guilt of the capital charge at the trial:

> Q. Is there any reason why you want to give this Grand Jury why you want to be electrocuted rather than face a trial by jury?
>
> A. Uh, the jury would convict me. There's enough evidence. I've told everybody I've done it, uh, why waste their time and mine?
>
> Q. All right. Is there any reason why you would rather be electrocuted than, uh, plead guilty and try it and possibly have your sentence reduced to life without parole?

> A. Uh, I can't see doing the rest of my life and I would, even if I got parole here, there are nine other states waiting with enough charges to give me life (inaudible) on every one of them.
> (Tr. 346)

After being indicted, Ritter filed on April 13, 1977, a written notice of intent to plead guilty to the capital charge. (Tr. 21)

At arraignment on April 18, 1977, against the advice of his attorney, Ritter pleaded guilty to the capital charge. (Tr. 27, 29, 48-60) The trial court entered the guilty plea in the official minutes of the court (Tr. 27, 29), and not withstanding that plea the case was submitted to a jury for the reasons discussed on pp. 27 - 28 of this petition, below.

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) The evidence

presented by the State at Ritter's trial is summarized in the Alabama Court of Criminal Appeals' initial opinion in this case in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977); in its second opinion reported as Ritter v. State, 375 So. 2d 266, 267 (Ala. Cr. App. 1978); and in the Alabama Supreme Court's opinion reported as Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979) (before the case was returned to it on remand from this Court), pp. 47a - 69a, infra.

After the State rested, Ritter filed a written "Request to Enter Guilty Plea" which was admitted into evidence and went to the jury. (Tr. 207-208, 252, 283) Ritter also took the stand, against the advice of his attorney, and admitted every element of the capital offense. (Tr. 216-221) The last

part of his direct examination is as follows:

> Q. Mr. Ritter, do you want to say anything to these people sitting in the Jury Box as to what you want them to do when they go back there?
>
> A. Well, I think there are two considerations. First, we did kill Mr. Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We did kill him, so, really, the only thing you can come back with is the death penalty. And the other consideration is, if you give me life, or if I got life imprisonment, I could get out in ten or fifteen years, and when I got out, I know where everybody on the Jury lives, and I wouldn't appreciate being in prison for ten or fifteen years, so I think I would have to come after you. That's about it.
>
> (Tr. 219-220)

The jury took less than fifteen minutes to convict Ritter of the capital offense. (Tr. 226-227) Following a sentence hearing on

April 27, 1977, the trial court sentenced Ritter to death. (Tr. 30-33, 229-237)[7]

The Appellate Court Proceedings

The Alabama Court of Criminal Appeals on October 25, 1977 affirmed Ritter's conviction and sentence in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977).

On May 19, 1978, the Alabama Supreme Court issued a decision affirming in part Ritter's conviction and sentence, but

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[7]Evans was also convicted of the capital offense and sentenced to death. His conviction and sentence were affirmed in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), aff'd sub nom. Evans v. State, 375 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979). Evans was denied a writ of habeas corpus in Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), cert. granted, No. 80-1714 (U.S. June 22, 1981). See pp. 17 -20, of this petition, below.

remanding the case to the Court of Criminal Appeals for consideration of the non-triggerman issues. Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978). On remand, the Court of Criminal Appeals in an August 9, 1978 opinion decided the non-triggerman issues against Ritter and again affirmed his conviction and sentence. Ritter v. State, 375 So. 2d 266 (Ala. Cr. App. 1978).

Following return of the case from remand, the Alabama Supreme Court on July 6, 1979, affirmed Ritter's conviction and sentence. Ritter v. State, 375 So. 2d 270 (Ala. 1979), pp. 47a - 69a, infra.

On June 30, 1980, this Court entered an order vacating the judgment and remanding the case to the Alabama Supreme Court "for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980)." Ritter v.

Alabama, 448 U.S. 903 (1980), pp. 41a-42a, infra.

On remand, the Alabama Supreme Court in a May 8, 1981 decision reversed Ritter's conviction and sentence. Ritter v. State, No. 77-798 (Ala. 1981), pp. 27a- 40a, infra.

The State filed a rehearing application, pp. 22a - 24a, infra, requesting the Alabama Supreme Court to specify whether its reversal was based on State or federal grounds. In response, the Alabama Supreme Court on June 12, 1981, extended its opinion on rehearing to explain that its reversal of Ritter's conviction and sentence was based on federal constitutional grounds. Ritter v. State, No. 77-798 (Ala. 1981) (on rehearing), pp. 3a - 21a, infra. See pp. 34 - 41 of this petition, below.

On June 23, 1981, the Alabama Court of Criminal Appeals issued an opinion reversing

and remanding the case for a new trial pursuant to the Alabama Supreme Court's decision. (That opinion is reproduced as Appendix I, pp. 70a - 71a, infra.)

On July 7, 1981, the Alabama Supreme Court denied the State's application for a stay of its judgment mandate pending the filing of this petition for a writ of certiorari.[8]

On July 27, 1981, Mr. Justice Powell denied the State of Alabama's application for a stay to permit it to obtain a writ of certiorari.[9]

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[8]The court's order denying the application for a stay is reproduced as Appendix A to the application for stay which was filed with Justice Powell previously. See, App. A to the Application in Alabama v. Wayne Eugene Ritter (No. A-43).

[9]Contemporaneous with the filing of this petition, Alabama has renewed its application for a stay pursuant to Rule 43.5. See pp. 42 - 57 of this petition, below.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Presents Federal Questions Identical to Two of Those for Which Certiorari Has Been Granted in the Case of this Respondent's Co-defendant

Respondent Ritter is the co-defendant of John Louis Evans, the habeas petitioner (respondent in this Court) in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), certiorari granted, No. 80-1714 (U.S. June 22, 1981). Ritter and Evans were partners in crime who were jointly indicted for a capital offense they committed, who entered identical pleas to that charge, who were jointly tried, and who were both convicted of that capital offense and sentenced to death for it. Evans and Ritter v. State, 361 So. 2d 654, 655-661, 663-666 (Ala. Cr. App. 1977). Their convictions and death sentences were jointly affirmed in a

single opinion by the Alabama Court of Criminal Appeals. Evans and Ritter v. State, supra, but thereafter the case became separated for reasons unrelated to the federal issues presented in this petition.[10]

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[10]The cases became separated when the Alabama Supreme Court in Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978), affirmed Evans' conviction in its entirety but remanded Ritter's case to the Alabama Court of Criminal Appeals for consideration of whether a non-triggerman can be convicted of a capital offense and sentenced to death under Alabama law. The Court of Criminal Appeals answered in the affirmative in Ritter v. State, 375 So. 2d 266 (Ala. Cr. App. 1978). The Alabama Supreme Court affirmed that conclusion in Ritter v. State, 375 So. 2d 270 (Ala. 1979), holding that even though Evans was the triggerman, Ritter was equally guilty of the capital offense because Ritter knowingly sanctioned and facilitated the intentional killing and was an accomplice in it. 375 So. 2d at 274, pp. 57a -60a, infra.

As a result of the procedural events described above, Evans' certiorari petition reached this Court before certiorari was granted in Beck v. Alabama, 444 U.S. 897 (Oct. 9, 1979), and was denied in Evans v. Alabama, 440 U.S. 930 (Feb. 21, 1979). Ritter's certiorari petition, on the other hand, which reached this Court later, was granted, the Alabama Supreme Court's judgment vacated, and the case remanded for further consideration in light of the Beck decision in Ritter v. Alabama, 448 U.S. 903 (1980), pp. 41a -42a, infra.

On June 22, 1981, this Court granted Alabama's[11] petition for a writ of certiorari in Britton v. Evans, No. 80-1714, to review four federal issues presented by that case. Two of those federal issues which this Court has agreed to review are verbatim identical to the two federal issues presented in this case. Compare p. i of this petition, above, with Petition for Certiorari, Britton v. Evans (U.S. Oct. Term, 1981), No. 80-1714, p. i.[12] Certiorari should either be granted in this case for the same reasons it was granted in Britton v. Evans, supra, or a

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[11]The certiorari petition carries the name of the Commissioner of Corrections (Britton) and warden at the prison where Evans was confined, but the real party in interest is, of course, the State of Alabama.

[12]The two additional federal questions raised in Britton v. Evans, No. 80-1714, which are not presented by this case are peculiar to that case's federal habeas nature. See, Questions No. 2 and 4 in Petition for Certiorari, Britton v. Evans, supra. This Court's grant of certiorari in that case was not limited to any particular question or questions.

stay should be issued and this petition held in abeyance until this Court issues its decision in the Evans case. See, pp. 42 - 56 of this petition, below.

The Decision Below Misinterprets and Misapplies this Court's Decision in Beck v. Alabama, 447 U.S. 625 (1980), and is Contrary to Related Decisions of this Court

The first federal question presented in this case is identical to the first question this Court granted certiorari to consider in Britton v. Evans, No. 80-1714. That question concerns whether this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), requires the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded

guilty to the capital offense. That federal issue is clearly presented by both the Evans and Ritter cases which stem from the same crime and joint trial.

The material facts as they relate to Ritter are set out on pp. 5 - 13 of this petition, above, and were well summarized by Justice Jones in his special opinion in the court below dissenting from the reversal of Ritter's conviction. As Justice Jones said:

> Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand -- against advice of counsel and following the trial court's thorough admonition as to his constitutional rights -- and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

Ritter v. State, No. 77-798 (Ala. May 8, 1981) (before rehearing), slip op. at 6-7 (opinion of Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), pp. 36a - 38a, infra; id., (June 12, 1981) (on rehearing), slip op. at 7-8 (opinion of Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), pp. 13a - 16a, infra.[13]

The facts of this case present with equal clarity the first federal question which this Court granted certiorari to

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[13]While concluding that Ritter was entitled to a new sentence hearing under the procedures set out in Beck v. State, 396 So. 2d 645 (Ala. 1980), Justices Jones, Maddox, and Adams disagreed with the majority's decision that Beck v. Alabama, 447 U.S. 625 (1980), required that Ritter's conviction be reversed. Those three members of the court below would have affirmed the conviction, and they dissented from the decision for that reason. See, pp. 6a - 21a and 28a - 40a, infra. In addition, see n. 20 on p. 51 of this petition, below.

review in Britton v. Evans, No. 80-1714. In that case the Fifth Circuit interpreted this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), to require the reversal of all Alabama pre-Beck capital convictions regardless of the facts and without any showing or even allegation that the preclusion clause struck down in Beck harmed or prejudiced a particular defendant in any way. That holding misinterprets this Court's Beck decision and is in conflict with related decisions of this Court for the reasons discussed in the certiorari petition in that case. See, Petition for Certiorari, Britton v. Evans, No. 80-1714 (U.S. Oct. Term, 1981), pp. 15-44.

Now, in this case, a majority of the court below has reached the same holding as the Fifth Circuit in a case in which the material facts are identical. Moreover, the court below expressly relied on the Fifth

Circuit's erroneous decision in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), certiorari granted, No. 80-1714 (U.S. June 22, 1981), in reaching its decision. The decision below misinterprets this Court's Beck decision and is in conflict with related decisions of this Court for the same reasons discussed on pp. 15-44 of the State's certiorari petition in Britton v. Evans, supra, and certiorari should be granted in this case for the same reason it was granted in that case.[14]

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[14]An alternative to granting certiorari in this case would be for the Court to hold this certiorari petition in abeyance until it decides Britton v. Evans, No. 80-1714. However, since the retrial of this case has been scheduled for October 26, 1981, if this Court does not act on the certiorari petition in this case before that date, a stay of the lower court's judgment should be issued. See pp. 42 - 56 of this petition, below.

The Decision Below is Contrary to Decisions of this Court Concerning the Effect of Guilty Pleas

The second federal issue presented by this case concerns the effect of Ritter's guilty plea on his challenge to validity of his conviction. In the trial court, Ritter pleaded guilty to the capital charge for which he was convicted, and his guilty plea was accepted and entered in the official minutes of the court. (Tr. 21, 27, 29, 48-60, 207-208, 252, 283, 345-348); Ritter v. State, No. 77-798 (Ala. May 8, 1981) (before rehearing), slip op. at 6 (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), p. 37a, infra; id., (June 12, 1981) (on rehearing), slip op. at 7 (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), p. 14a, infra.

Under Alabama law, when a defendant in a capital case pleads guilty, the case against him is still submitted to a jury, since only a jury can sentence a defendant to death under Alabama law. Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979). The Alabama Court of Criminal Appeals has held that notwithstanding the necessity of presenting every capital case to a jury, a guilty plea in a capital case still has the effect of waiving all non-jurisdictional defects in the case. Graham v. State, No. 4 Div. 787 (Ala. Cr. App. 1980), slip op. at 16, cert. granted, No. 79-568 (Ala. Jan. 6, 1981).

Indeed, the Alabama Supreme Court in this very case, recognized that while a capital case guilty plea is not accepted in lieu of a trial under Alabama law, such a guilty plea does as a matter of state law

waive any and all non-jurisdictional defects occurring before or after the plea is entered. The court held that Ritter did enter a guilty plea, that that plea eliminated any possibility of injury to Ritter from any defect in the jury's instructions, and that the guilty plea constituted a waiver of any defect in those instructions. Ritter v. State, 375 So. 2d 270, 273, 276 (Ala. 1979), pp. 50a - 51a and 65a - 68a, infra.

The problem is that after this case was returned to it on remand from this Court, the court below misinterpreted Beck v. Alabama, 447 U.S. 625 (1980), to require reversal in spite of Ritter's guilty plea. The court below was no doubt led astray by the Fifth Circuit's erroneous holding that as a matter of federal constitutional law a guilty plea waives only defects occurring

prior to its entry. Evans v. Britton, 639 F. 2d 221, 223 (5th Cir. 1981) (on rehearing), certiorari granted, No. 80-1714 (June 22, 1981).

The second federal question presented by this case is therefore identical to the third of the "Questions Presented" listed in the certiorari petition in the Evans case. Petition for Certiorari, Britton v. Evans, No. 80-1714 (U.S. Oct. Term, 1981), p. i. That question is whether as a matter of federal constitutional law a valid guilty plea is limited in effect to waiving defects occurring prior to the plea or does it also render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established.

This Court should grant certiorari to review that guilty plea question in this case for the same reason it granted certiorari to review the identical question

in the Evans case. See, Petition for Certiorari, Britton v. Evans, No. 80-1714, pp. 44-48.[15]

II.

The Decision Below is Not Based on State Law Grounds

The decision below reversing Ritter's conviction and sentence is exclusively based on federal constitutional grounds and not on state law grounds. That fact is established not only by the express language of the decision below but also by the events leading up to it.

This Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), was issued on

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[15]Alternatively, this Court should stay the judgment of the court below and hold this petition for certiorari in abeyance pending this Court's decision in the Evans case. See pp. 42 -57 of this petition, below.

June 20, 1980. At that time this case was pending before the Court on a petition for certiorari which had been filed by Ritter. Ritter v. Alabama, No. 79-5741. By letter dated June 23, 1980, the State of Alabama requested that instead of reversing them, this Court should vacate and remand the Ritter case and all other Alabama pre-Beck capital convictions to the Alabama Supreme Court for further consideration in light of the Beck decision. That letter, which is reproduced as Appendix G hereto, pp. 43a - 46a, infra, explained that the Ritter case was distinguishable from the Beck case because there was absolutely no evidentiary basis for a lesser included offense in Ritter. On June 30, 1980, this Court vacated the judgments in the Ritter case and in seven other cases and remanded them

to the Alabama Supreme Court for further consideration in light of the Beck decision. Ritter v. Alabama, 448 U.S. 903 (1980), pp. 41a - 42a.

After the Ritter case was remanded to the Alabama Supreme Court, the State filed a motion in that court requesting that a briefing and argument schedule be set in the Ritter case. The State's motion explained that:

> The facts of this case squarely present a fundamental issue of great importance which is relevant to the appeals in all capital cases in which there was no plea bargain agreement. That issue is whether the Beck decision requires the reversal of all such pre-Beck capital convictions or only requires reversal of those convictions in which there was some basis in the evidence at trial to support a lesser included offense instruction and verdict.

State's Motion for Briefing and Argument Schedule, Ritter v. State, No. 77-798 (Ala. Dec. 31, 1980) (on remand), p. 1.

The Alabama Supreme Court granted the State's motion and that issue was briefed and argued. While Ritter could have briefed and argued state law issues to the court below, he chose instead to present purely federal questions. Alabama appellate practice requires that all issues presented and argued be specified in a special section of the brief entitled, "Statement of the Issues Presented for Review." In that section of his brief, Ritter described the sole issue he argued to the court below as follows:

> Whether applicable federal constitutional principles mandate a reversal of petitioner's conviction and vacation of his death sentence in light of the decision of the United States [sic] in Beck v. Alabama?

Brief for Ritter, Ritter v. State, No. 77-798 (Ala. Feb. 5, 1981), p. iv. That is the only issue Ritter argued in the court

below, and he relied heavily on the decision in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (5th Cir. 1981).

Thereafter, the Alabama Supreme Court issued its initial opinion in this case on remand on May 8, 1981. (That opinion is reproduced as Appendix E, hereto, pp. 27a - 40a, infra). In a one-sentence opinion, the majority concluded that both Ritter's conviction and sentence were due to be reversed, Ritter v. State, No. 77-798 (Ala. May 8, 1981) (before rehearing), pp. 27a - 28a, infra, but did not specify on what grounds.[16]

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[16]Three of the nine members of the court concurred in the conclusion that Ritter was entitled to a new sentence hearing but dissented from the holding that he was also entitled to a new trial. Ritter v. State, No. 77-798 (Ala. May 8, 1981), slip op. at 2-8 (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), pp. 28a - 40a, infra.

Thereafter, the State filed an application for rehearing in the nature of a request for clarification which asked the court below to specify whether the majority's decision to reverse Ritter's conviction and sentence were based on federal constitutional grounds or on state law grounds. (The State's rehearing application is reproduced as Appendix C, hereto, pp. 22a - 23a, infra.)

In response to the State's request for clarification of the grounds of its decision, the majority of the court below extended its opinion to read as follows:

> Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, 396 So. 2d 645 (Ala. 1980).
>
> We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision

> reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, ___ F. 2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

Ritter v. State, No. 77-798 (Ala. June 12, 1981) (on rehearing), slip op. at 1-2 (majority opinion) (emphasis added).[17]

The majority's clarification of its prior opinion establishes that the decision below is based on federal constitutional grounds and not on state law grounds. That is why the court below explained that it

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[17]While the opinion states that the application for rehearing is denied and an order was entered to that effect, that does not mean that the court did not intend to clarify the grounds of its decision. Under Alabama appellate practice a rehearing application is deemed granted only when the result of the decision is changed.

When a request for clarification contained in an application for rehearing is complied with, the opinion is extended to make the clarification, but the application for rehearing itself is said to be denied because the result of the decision has not been changed. That is why the court below extended its opinion but "denied" the application for rehearing.

felt that decision "compelled by the decision of the Supreme Court of the United States in Beck" and "consistent with the interpretation of that decision reached by the Fifth Circuit" in the Evans case. Ritter v. State, supra, slip op. at 1, p. 4a, infra.

The decision of the Alabama Supreme Court in Beck v. State, 396 So. 2d 645 (Ala. 1980) (on remand), was cited by the court below, Ritter v. State, supra, slip op. at 1, p. 4a, infra, but it could not have been intended as a state law basis for reversal. In the Beck case on remand, the State conceded that that particular defendant was entitled to a new trial because of the evidentiary basis for a lesser offense instruction in his case, Beck v. State, 396 So. 2d at 647. The State also admitted that many other pre-Beck defendants would be in the same situation, but the State did not concede that every pre-Beck capital defendant was

entitled to a new trial, nor did the court so hold in Beck on remand.

Instead the court left the issue open at that time. After referring to other pre-Beck capital convictions, the court in Beck on remand said, "Many of the death cases may have to be retried and we should not be understood here as holding that either the conviction or death penalty was appropriate in each of the cases." Beck v. State, 396 So. 2d at 655.

What the Beck case on remand did do was authorize the retrial under the capital procedures set forth in that opinion of any pre-Beck capital cases that had to be reversed because of this Court's Beck decision. Beck v. State, 396 So. 2d at 655-664.

The reason the court below in this case directed the Alabama Court of Criminal Appeals to grant a new trial under the authority of the decision in Beck v. Alabama,

447 U.S. 665 (1980), and the decision in Beck v. State, 396 So. 2d 645 (Ala. 1980) (on remand), was that it felt that this Court's Beck decision "compelled" the reversal, and that its own Beck decision (on remand) authorized the retrial pursuant to capital procedures specified therein of any such cases that had to be retried. Therefore, the decision in Beck v. State, 396 So. 2d 645 (Ala. 1980), is not a state law basis for reversal of Ritter's conviction in this case and it was not cited by the court below for that purpose.

If there were any doubt about whether the decision below was based on state or federal grounds, that doubt is dispelled by the special opinion joined by three members of the court below on rehearing. Justice Maddox, who along with two other members of the court below disagreed with the

majority's conclusion that Beck v. Alabama, 447 U.S. 625 (1980), mandated reversal, nonetheless agreed with the extension of the opinion to indicate that the majority's decision was based on federal constitutional grounds. He explained:

> I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in Beck v. Alabama, ___ U.S. ___ (1980). This Court considered Ritter's case, in light of Beck, only because the case was remanded here at the request of the Attorney General. ...

Ritter v. State, No. 77-798 (Ala. June 12, 1981) (on rehearing), slip op. at 10 (special concurring opinion of Maddox, J., joined by Jones and Adams, J.J.), p. 18a, infra. He further explained that:

> it is obvious that this Court, which had affirmed Ritter's conviction [Ritter v. State, 375 So. 2d 270 (1979)], now holds Ritter

> is entitled to a new trial because the United States Supreme Court has mandated it in Beck. Obviously, I do not believe that Ritter is in the same situation as Beck was; therefore, I joined with Mr. Justice Jones in his dissenting views which he expressed on original delivery.
>
> I still adhere to my original view that under the facts of this case, Ritter is not entitled to a new trial to determine his guilt of innocence of the capital offense. He is only entitled to a sentencing hearing before a jury. ...

Ritter v. State, supra, slip op. at 10, p. 19a, infra.[18]

In summary, the majority in the court below extended its opinion on rehearing to clarify that its decision was based on federal grounds, and three members of the court even wrote a special concurring opinion to stress that fact.

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[18]The State does not concede that Ritter is entitled to a new sentence hearing. See n. 20 on p. 51 of this petition, below.

III.

If this Court Does Not Either Grant Certiorari Immediately or Act Soon to Stay the Lower Court Judgment Pending a Decision in Britton v. Evans, No. 80-1714, Inconsistent Results Are Possible and Confusion is Certain

After the decision below, the trial court scheduled Ritter's retrial for October 26, 1981. The court below on July 7, 1981 denied Alabama's request for a stay of its judgment pending consideration by this Court of this certiorari petition. Thereafter, Alabama filed an application for stay pursuant to 28 U.S.C. §2101(f) to permit Alabama to obtain a writ of certiorari. On July 25, 1981, Justice Powell denied that application. Alabama v. Wayne Eugene Ritter (No. A-43).

Simultaneous with the filing of this petition, Alabama has renewed its application for a stay by asking the Clerk's office to present the application to another

Justice. While such a renewed application is not favored, the present case presents an extraordinary situation in which granting the stay is essential to prevent disparate results, widespread confusion, and a possible miscarriage of justice.

This case is extraordinary because it presents in the most identical way possible two specific federal constitutional issues that this Court has granted certiorari in a co-defendant's case to determine. Issues presented numbers 1 and 3 in Evans v. Britton, No. 80-1714 (certiorari granted June 22, 1981), are verbatim identical to the issues presented in this case. Compare, Petition for Certiorari, Evans v. Britton, No. 80-1714 (U. S. Oct. Term, 1981), pp. i-ii, with p. i of this petition, above. The material facts are identical for Ritter and Evans because they committed the same crime, entered the same plea, pursued the

same self-destructive legal strategy, were jointly tried, jointly convicted, and jointly sentenced to death. In fact, the phrase "the defendants" in Question Presented no. 1 in the Britton v. Evans, supra, petition and in this petition refers to Ritter and Evans.

Consider the disparate results that will be possible if a stay is not granted in this case pending the decision on the merits of Britton v. Evans, No. 80-1714. If this Court decides Questions Presented Nos. 1 and 3 in that case (which are nos. 1 and 2 in this case) in Alabama's favor -- and that is certainly possible or this Court would not have granted certiorari to consider them -- then that will mean that neither Ritter nor Evans is entitled to a new trial. Yet, unless this Court acts before Ritter's October 26, 1981 retrial date to stay the lower court's decision in this case, Ritter will

already have received a retrial by the time this Court decides the Evans case. If that occurs, then Ritter will have received a new trial that he was not entitled to while Evans will be facing the electric chair.

However one feels about capital punishment, two co-defendants who committed the same crime, who were convicted by the same jury and were sentenced by the same court on the same day, and whose cases present identical federal constitutional issues should have those issues decided in the same way. The only way to ensure that the identical federal constitutional issues will be decided consistently in this case and in Britton v. Evans, No. 80-1714, is for this Court to grant a stay of the lower court's judgment pending a decision in the Evans case. This Court and this Court alone has final authority to decide those federal constitutional issues. By granting

certiorari in Britton v. Evans, supra, this Court has indicated that it intends to address these issues, and this Court's decision of those issues should govern in this case as well. That is only possible if a stay is granted before October 26, 1981.

In addition to the desirability of avoiding the potential for disparate results, a stay in this case should also be granted to avoid confusing the issues in Britton v. Evans, No. 80-1714. If Ritter receives a retrial, then Evans' attorneys will argue that he is entitled to a retrial as well because this Court by not entering a stay in Ritter's case permitted Ritter to have one. Evans' attorneys will also argue that a decision not to stay the lower court decision in this case is tantamount to a decision of the federal constitutional issues affecting Evans and Ritter in their

favor. The federal constitutional issues which this Court granted certiorari in Britton v. Evans, supra, to review are important. Those issues should not be confused by any collateral matter stemming from a failure to grant a stay in this case.

The memorandum Ritter filed in opposition to the stay application in this case,[19] argues that this case is factually different than the Evans case because Ritter was not the triggerman and Evans was. In fact, Ritter knowingly participated in the killing by aiding and abetting Evans in it, see pp. 6-7, above, and the Alabama Supreme Court has held that because of that fact under Alabama law Ritter is just as culpable

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[19]Alabama's application for a stay was filed on July 16, 1981; Ritter's memorandum in opposition was filed on or about July 24, 1981; and Justice Powell denied the application on July 25, 1981.

for the killing as Evans. Ritter v. State, 375 So. 2d 270, 274-275 (Ala. 1979) ("Clearly Ritter encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necessary."), pp. 57a - 60a, infra. In any event, none of the federal questions presented in Britton v. Evans, No. 80-1714, and in this case involve any non-triggerman issue. It is in no way material to the stay application.

Ritter argues in his memorandum opposing the stay that the Evans case and this case are different because this one is a direct appeal while the Evans case is a habeas proceeding. That distinction makes no difference relevant to the two common federal constitutional issues -- whether the Beck decision requires a retrial of the Ritter and Evans cases and what effect their identical guilty pleas had on the

constitutional defects they are now claiming. Notwithstanding Ritter's proffered red herrings, his case and Evans' case are identical insofar as the two federal constitutional issues presented in this petition -- and which this Court has already agreed to review in the Evans case -- are concerned.

Ritter also argues in his memorandum opposing the stay that Alabama has not made a sufficient showing of irreparable harm. That incredible argument is premised on the assumption that it will not harm the people of Alabama to retry Ritter even if the retrial is based entirely on an erroneous conclusion concerning federal constitutional law. The people of Alabama have a right to have constitutionally valid judgments and sentences carried out.

It has taken four-and-a-half years to progress this case to where it presently is. If it has to be retried, those four-and-a-half years of litigation will go down the drain and Alabama will have to start all over. That will contribute to the type of "endlessly drawn out legal proceedings" and "mockery of our criminal justice system" about which Justice Rehnquist spoke in Coleman v. Balkcom, 68 L. Ed. 2d 334, 339 (1981) (Rehnquist, J., dissenting from the denial of certiorari). The mockery will seem particularly pronounced if this Court in Britton v. Evans, No. 80-1714, decides the federal constitutional issues in a way that establishes that Ritter in fact was not entitled to a retrial but received one anyway because the court below erroneously thought

he was and this Court refused to stay that court's decision.[20]

Ritter also argues that the stay should be denied because it is not likely that four members of this Court would vote to grant the certiorari petition. That assertion is incredible in the face of the fact that at least four members of this Court have already voted to grant the certiorari petition in Britton v. Evans, No. 80-1714, which included the two identical federal questions presented in this petition. Of

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[20]Ritter also argues that since the court below held that he was entitled to a new sentence proceeding because of Beck v. Alabama, 447 U.S. 625 (1980), it will not harm the State to have to retry Ritter while it is in the trial court again. That argument should be rejected for two reasons. First, the State does not concede that Ritter and Evans are entitled to new sentence proceedings. That issue will be addressed in Britton v. Evans, No. 80-1714, and should not be foreclosed now. Secondly, it is absurd to say that the State has no interest in preserving a conviction even if the case is to be remanded for new sentence proceedings.

course, ordinarily what this Court would do in such a situation would be to hold this petition in abeyance pending the decision of these issues in Britton v. Evans, supra. That is a good procedure to follow here, but a stay must be granted prior to the October 26, 1981 retrial date in this case or this Court's decision in the Evans case will be meaningless insofar as this case is concerned.

Finally, Ritter argues that a stay should be denied because the lower court's decision was either based in part on state law grounds or is ambiguous on the point. As explained on pp. 30 - 41, above, the lower court decision was based exclusviely on federal constitutional grounds. That is why the court below extended its opinion on rehearing -- to make clear that it felt that the holding was "compelled by" this Court's decision in Beck v. Alabama, 447 U.S. 625

(1980), and was "consistent with" the Fifth Circuit's Evans decision. Ritter v. State, No. 77-798 (June 12, 1981) (on rehearing), slip op. at 2 (majority opinion), p. 4a, infra. That is also why three members of the court below concurred specially on rehearing in order to emphasize that the reversal was based solely on an interpretation (or misinterpretation) of this Court's Beck decision which involved only federal law. Ritter v. State, supra, slip op. at 10-11 (special concurring opinion of Maddox, J., joined by Jones and Adams, J.J.), pp. 18a - 21a, infra.[21]

Evan if the decision below were based in part on state law grounds -- which it was

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[21]As is explained on pp. 37 -39, above, the reference to Beck v. State, 396 So. 2d 645 (Ala. 1981) (on remand), in the opinion below does not indicate a state law basis for the decision, but indicates that the retrial is to be in accordance with the capital procedures promulgated in that opinion.

not -- it would not foreclose review here because this would be a situation in which "the [state] court felt compelled by what it understood federal constitutional considerations to be..." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); Delaware v. Prouse, 440 U.S. 648, 653 (1979). That is the very word the court below used to describe how it felt -- "compelled" by what it understood to be federal constitutional considerations.

As this Court indicated in another Alabama case, even if there were ambiguity as to whether the decision below was based on federal or state grounds, it would be open for to this Court to remand the case to the lower court for clarification of the ground of the decision. Orr v. Orr, 440 U.S. 268, 276 (1976). Of course, to be anything but futile, such a remand in this

case would have to be accompanied by a stay of the lower court's judgment.

Finally, Ritter argues that this Court should not grant the stay because the court below refused to stay its judgment. That fact is hardly surprising, since Rule 44.4 requires that in all but "the most extraordinary circumstances" a stay have been sought from the court below before an application for stay will be entertained by this Court. It would be "most extraordinary" if this Court were asked to grant a stay that had not been refused by a lower court.

The fact that the court below refused to grant a stay of its judgment in this case is not at all surprising in view of the fact that the Alabama Supreme Court apparently routinely denies any application for a stay of its judgment in a capital case.

For example, on December 12, 1979, a Justice of this Court granted a stay of the

Alabama Supreme Court's judgment and order setting an execution date in connection with Ritter v. Alabama, 448 U.S. 903 (1980), No. 79-5741, this case's prior appearance in this Court. The Alabama Supreme Court had refused to stay its judgment pending disposition of Ritter's petition for certiorari in this Court, but this Court entered a stay to permit Ritter to have his petition decided by this Court.[22]

Now, the State is asking this Court to do for it what has been done for Ritter

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[22]Other capital cases in which this Court granted stays of the Alabama Supreme Court's judgment after that court refused to stay its judgment to permit disposition of a certiorari petition by this Court include Wilson v. Alabama, 448 U.S. 903 (1980), No. 79-5301, in which Justice Powell granted the stay on September 5, 1979, and Mack v. Alabama, 448 U.S. 903 (1980), No. 79-5835, in which Justice Powell granted the stay on December 27, 1979.

The Alabama Supreme Court has granted some stays in capital cases before, but it appears to have stopped doing so in the fall of 1979, at least insofar as counsel for Petitioner has been able to ascertain. No explanation for that change in practice has ever been given.

previously. Considerations of fairness dictate nothing less.

CONCLUSION

This Court should grant certiorari before the scheduled October 27, 1981 retrial date in this case. Alternatively, this Court should enter a stay of the lower court's judgment so that this petition may be acted on after Britton v. Evans, No. 80-1714, which involves the two federal issues presented in this petition, is decided.

Respectfully submitted,

Charles A. Graddick EC

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

Edward E. Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

Counsel of Record

CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 7th day of August, 1981, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

Honorable John R. Carroll
1001 South Hull Street
Montgomery, Alabama 36104

I further certify that I have served all parties required to be served.

Edward E. Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

Address of Counsel:

Asst. Alabama Atty. Gen. Edward E. Carnes
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

Appendix

Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

81-247

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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D	25a	May 8, 1981 Alabama Supreme Court Order (Before Rehearing)
E	27a	May 8, 1981 Alabama Supreme Court Opinion (Before Rehearing)
F	41a	June 30, 1980 United States Supreme Court Remand Order
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APPENDIX A

June 12, 1981

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1980-81

77-798

IN THE MATTER OF:

WAYNE EUGENE RITTER

VS.

STATE OF ALABAMA

AFTER REMAND BY
UNITED STATES
SUPREME COURT

IT IS ORDERED that the application for rehearing filed in the above cause on May 18, 1981, be, and the same is hereby, denied. OPINION EXTENDED.

SHORES, J.
FAULKNER, ALMON, EMRBY AND BEATTY, JJ., CONCUR IN DECISION AND IN DENIAL OF REHEARING.
TORBERT, C.J., CONCURS SPECIALLY IN DECISION, WITH OPINION, AND CONCURS IN DENIAL OF REHEARING.
JONES, J., WITH WHOM MADDOX AND ADAMS, JJ., CONCUR, CONCURS IN PART AND DISSENTS IN PART IN DECISION,

WITH OPINION.
MADDOX, J., WITH WHOM JONES AND ADAMS, JJ., CONCUR, CONCURS SPECIALLY IN DENIAL OF REHEARING, WITH OPINION.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 7th day of July 1981

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX B

JUNE 12, 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798

IN THE MATTER OF:

Wayne Eugene Ritter

v.

State of Alabama

After Remand by the United States Supreme Court

On Application for Rehearing

SHORES, JUSTICE.

The application for rehearing is denied. The opinion of the Court dated May 8, 1981 is extended so that the opinion shall read as follows:

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the

authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, 396 So. 2d 645 (Ala. 1980).

We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, ___ F. 2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

REVERSED AND REMANDED; APPLICATION FOR REHEARING DENIED; OPINION EXTENDED.

Faulkner, Almon, Embry, and Beatty, JJ., concur in decision and in denial of rehearing.

Torbert, C. J., concurs specially in decision, with opinion, and concurs in denial of rehearing.

Jones, J., with whom Maddox and Adams, JJ., concur, concurs in part and dissents in part in decision, with opinion.

Maddox, J., with whom Jones and Adams, JJ., concur, concurs specially in denial of rehearing, with opinion.

TORBERT, CHIEF JUSTICE (Concurring specially).

Although I agree with the result reached by the majority, I do not wish to be understood as being in favor of abolishing or otherwise modifying the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser included offense. See, Roberts v. Louisiana, 428 U.S. 325 (1976).

JONES, JUSTICE (Concurring in part and dissenting in part in decision):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is

susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry;

it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser

included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of

evidence which would support a noncapital offense verdict. He argues:

> " . . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a

finding. We do not read Beck as suggesting that a pre-Beck capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

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[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offense doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every

reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such a hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans

and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough

admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense,

including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradiction to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

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[2]See Brady v. United States, 397 U.S. 742 (1970).

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur

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[3]See Brady v. Maryland, 373 U.S. 84 (1963); Parker v. North Carolina, 397 U.S. 790 (1970).

MADDOX, JUSTICE (Concurring specially in denial of rehearing).

I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in Beck v. Alabama, ___ U.S. ___ (1980). This Court considered Ritter's case, in light of Beck, only because the case was remanded here at the request of the Attorney General. In brief, the Attorney General sets out the facts:

> On June 20, 1980, the United States Supreme Court issued its decision in Beck v. Alabama, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). On June 23, 1980, the State filed a letter in the United States Supreme Court arguing that Ritter's case was distinguishable from Beck, because there was no evidentiary basis for a lesser included offense in Ritter's case. In view of that difference, the letter

> requested that the Court remand Ritter's case to the Alabama Supreme Court for reconsideration in light of Beck, rather than reversing it on authority of Beck.

In view of the above, it is obvious that this Court, which had affirmed Ritter's conviction [Ritter v. State, 375 So. 2d 270 (1979)], now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in Beck. Obviously, I do not believe that Ritter is in the same situation as Beck was; therefore, I joined with Mr. Justice Jones in his dissenting views which he expressed on original delivery.

I still adhere to my original view that under the facts of this case, Ritter is not entitled to a new trial to determine his guilt of innocence of the capital offense. He is only entitled to a sentencing hearing before a jury. That there was absolutely no evidence of

Ritter's guilt of a lesser included offense is plain, and had an instruction on lesser included offenses been given in this case, the principle announced in Roberts v. Louisiana, 428 U.S. 325 (1976), would be applicable. There, the Supreme Court of the United States held that the Louisiana death penalty scheme which required juries in all first degree murder cases to also be instructed on manslaughter and second degree murder even if there was not a scintilla of evidence to support such a verdict was unconstitutional.

I think a majority of this Court has misread Beck to require a new trial in a case like Ritter's where the record of trial affirmatively precludes any possibility that the defendant could have adduced any evidentiary support for a lesser included offense. My difference with the majority in this point aside,

however, I agree with the majority's basis for its extension of the opinion on rehearing.

I would also add one additional point on which there is no disagreement among the members of the Court: The order of remand by the Court of Criminal Appeals, as mandated by this Court, is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this cause.

Jones and Adams, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 12 day of June, 1981

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

WAYNE EUGENE RITTER,	)	
Appellant	)	
v.	)	No. 77-798
STATE OF ALABAMA,	)	
Appellee	)	

THE STATE'S APPLICATION FOR REHEARING IN THE NATURE OF A REQUEST FOR CLARIFICATION

The State of Alabama, as appellee in this case, applies for rehearing in the nature of a request for clarification of this Court's May 8, 1981 opinion. More particularly, the State respectfully requests this Court to clarify whether its May 8, 1981 decision is based on federal constitutional grounds, on state law grounds, or on both federal constitutional and state law grounds.

The reasons for this request for clarification are set out in the accompanying brief filed in support of this petition.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL

/s/ Ed Carnes
ED CARNES
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Assistant Attorney General Ed Carnes
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
205/834-5150

CERTIFICATE OF SERVICE

I certify that I have served a copy of this application on appellant by mailing a copy, postage prepaid, to his attorneys at the following address:

Honorable John L. Carroll
1001 South Hull Street
Montgomery, Alabama 36104

Done this the 18th day of May, 1981.

/s/ Ed Carnes
ED CARNES
ASSISTANT ATTORNEY
GENERAL

APPENDIX D

May 8, 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1980-81

77-798

IN THE MATTER OF:

WAYNE EUGENE RITTER

VS.

STATE OF ALABAMA

AFTER REMAND BY UNITED STATES SUPREME COURT

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that this cause be reversed and annulled, and that this cause be remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

OPINION BY SHORES, J.
TORBERT, C.J., FAULKNER, ALMON, EMBRY AND BEATTY, JJ., CONCUR.
MADDOX, JONES AND ADAMS, JJ., CONCUR IN PART AND DISSENT IN PART.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out and as same appears of record in said Court.
Witness my hand this 7th day of July 1981

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX E

MAY 8 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798

Ex parte Wayne Eugene Ritter

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C.J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of

Beck v. Alabama, ___ U.S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of

lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter

to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to

> death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> " . . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction,

I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read Beck as suggesting that a pre-Beck capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his

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[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be

resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively

eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

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[2]See Brady v. United States, 397 U.S. 742 (1970).

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is

impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur.

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[3]See Brady v. Maryland, 373 U.S. 84 (1963); Parker v. North Carolina, 397 U.S. 790 (1970).

APPENDIX F

UNITED STATES SUPREME COURT

ORDERS

June 30, 1980

No. 79-5026. WILLIAMSON v. ALABAMA;

No. 79-5301. WILSON v. ALABAMA;

No. 79-5458. HORSLEY v. ALABAMA;

No. 79-5525. CADE v. ALABAMA;

No. 79-5563. BALDWIN v. ALABAMA;

No. 79-5709. THOMAS v. ALABAMA;

No. 79-5741. RITTER v. ALABAMA; and

No. 79-5835. MACK v. ALABAMA. Sup. Ct. Ala. Motions of petitioners for leave to proceed in forma pauperis and certiorari granted. Judgments vacated and cases remanded for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). Reported below: No. 79-5026, 370 So. 2d 1066; No. 79-5301, 371 So. 2d 943; No. 79-5458, 374 So. 2d 375; No. 79-5525, 375 So. 2d 828; No. 79-5563, 372 So. 2d 32; No. 79-5709, 373 So. 2d 1167;

No. 79-5741, 375 So. 2d 270; No. 79-5835, 375 So. 2d 504.

APPENDIX G

June 23, 1980

Honorable Michael Rodak, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Wayne Eugene Ritter v. Alabama (No. 79-5741)

Dear Mr. Rodak:

There are approximately ten Alabama capital punishment cases now pending before the Court on petitions for certiorari. It is my understanding that these cases will be taken up by the Court at its Wednesday conference.

The State of Alabama respectfully requests that the Alabama capital punishment cases pending on certiorari be remanded to the Alabama Supreme Court for reconsideration in light of Beck v. Alabama (No. 78-6621) rather than being reversed on authority of that decision.

The reason for this request is that the State of Alabama wishes to be able to argue that a few of the cases, such as Ritter v. Alabama (No. 79-5741), are factually distinguishable from Beck v. Alabama. The distinction, as explained on pp. 77-78 of our Beck brief on the merits and on pp. 4-22 of our brief in opposition to certiorari in Ritter, is that there was no evidentiary basis whatsoever for any lesser included offense instruction in the

Ritter case. That distinction takes the Ritter case outside the scope of the certiorari grant in Beck which was expressly premised on there being an evidentiary basis at trial for the lesser included offense ("... and when the evidence would have supported such a verdict?").

In addition, during oral argument in Beck v. Alabama, one of the Justices noted the possibility that a different rule might apply if there was no evidentiary basis for a lesser included offense. See Tr. of Oral Arg. 38-40. All of the lesser included offense precedents relied upon by the Court in its Beck opinion, such as Keeble v. United States, 412 U.S. 205 (1973), Berra v. United States, 351 U.S. 131 (1956), Stevenson v. United States, 162 U.S. 313 (1896), Jackson v. State, 337 So. 2d 1242 (Miss. 1976), and the universal rule in other states, are all premised on the requirement that there be at least some factual basis for a lesser included offense before a defendant is entitled to have the jury consider it. Accord, Gregg v. Georgia, 428 U.S. 153, 160, 161 n. 2, 163 (joint opinion); id. at 215-216 (opinion by White, J., joined by Burger, C.J., and Rehnquist, J.). The State conceded that there was such an evidentiary basis in Beck v. Alabama, slip op. 4, but the opposite is true in the Ritter case in which the petitioner repeatedly admitted, confessed, and pleaded guilty to all elements of the capital offense. See pp. 1-5 and 16-20 of our brief in opposition to certiorari in Ritter v. Alabama.

The precise issue presented in Ritter -- whether a capital defendant is entitled

to a lesser included offense instruction if there is absolutely no evidentiary basis whatsoever for it -- has been briefed and argued in the case of Ritter's co-defendant, John Louis Evans, and is awaiting decision by the Fifth Circuit Court of Appeals in Evans v. Alabama (5th Cir. No. 79-2674). See p. 78 n. 46 of our brief in Beck v. Alabama.

Attorneys for Wayne Eugene Ritter will undoubtedly argue that notwithstanding the distinction between his case and Beck v. Alabama, Ritter's conviction and sentence should still be reversed. The fact that that argument can and probably will be made is not the point. The point is that the State of Alabama should not be deprived of an opportunity to brief and argue its serious, non-frivolous contention that the Ritter case is distinguishable from Beck v. Alabama and should be resolved differently because of that distinction. If the Ritter case is remanded to the Alabama Supreme Court for reconsideration in light of Beck v. Alabama, both sides will have a fair opportunity to address the issue.

For the preceding reasons, the State of Alabama respectfully requests that Ritter v. Alabama (No. 79-5741) be remanded to the Alabama Supreme Court for reconsideration in light of Beck v. Alabama.

I have enclosed nine copies of this letter. Please see that a copy is delivered to the chambers of each Justice before Wednesday's conference.

I have this day served a copy of this letter on Wayne Eugene Ritter's attorney, the Honorable John L. Carroll, by hand-delivering a copy to him.

Sincerely,

/s/ Ed Carnes

Assistant Alabama
Attorney General

EC:sa
Enc.

cc: Hon. John L. Carroll

APPENDIX H

Ex parte Wayne Eugene RITTER.

(In re Wayne Eugene Ritter

v.

State of Alabama)

77-798.

Supreme Court of Alabama.

July 6, 1979.

Rehearing Denied Sept. 7, 1979.

The Supreme Court of Alabama, 361 So. 2d 666, remanded case in which defendant had been sentenced to death for consideration of the applicability to defendant's appeal of a statutory provision precluding the use of the felony-murder doctrine to supply evidence of intent. On remand, the Court of Criminal Appeals, 375 So. 2d 266, determined that the felony-murder doctrine was not improperly used to supply the intent required to convict under the capital felony statute and affirmed the

conviction. Defendant petitioned for certiorari, and the Supreme Court, Faulkner, J., held that: (1) the jury was not allowed to supply the intent required under the capital felony statute through the use of a felony-murder doctrine; (2) the evidence was sufficient to establish that defendant was an accomplice to the intentional killing of a pawnshop operator; (3) any error in the trial court's charge on the law of accomplices did not adversely affect defendant's substantial rights and was knowingly waived by defendant; (4) there was no constitutional infirmity in imposing the death sentence; (5) the possibility of any injury to defendant from the trial court's failure to charge on the elements of robbery was eliminated by defendant's prior knowing and voluntary plea of guilty to charges of robbery and intentional killing; and (6) defendant knowingly and

voluntarily waived any errors in the charge.

Affirmed.

Beatty, J., dissented.

FAULKNER, Justice.

This appeal comes to this Court on certiorari for the second time. Previously we remanded to the Court of Criminal Appeals for that court to consider whether or not the felony-murder doctrine was used to supply the requisite intent under our capital felony statute. Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978). On remand that court determined that the felony-murder doctrine was not so used and affirmed Ritter's conviction. Ritter v. State, [MS. Aug. 9, 1978] 375 So. 2d 266 (Ala. Crim. App. 1978). For the reasons set out below, we also conclude that the conviction must be affirmed.

Briefly, the facts of this case are as follows: Ritter, along with a companion, John Louis Evans, was charged under the capital felony statute, § 13-11-2(a)(2), Code 1975, with the intentional killing and robbery of Edward Nassar, a Mobile pawn shop owner. Contrary to the repeated advice of his attorney, Ritter entered a plea of guilty to the charge. At arraignment and prior to the entry of his guilty plea Ritter was thoroughly advised of his constitutional rights both by the trial judge and by his attorney in open court. Ritter was continuously asked if he understood what was being said, to which he replied that he did. He was given the opportunity to ask questions about his rights and the trial procedure, but he affirmatively declined to do so. After Ritter entered his guilty plea the trial judge ordered the matter presented to a jury since only

a jury may sentence a defendant to death under our capital felony statute. § 13-11-1, et seq., Code 1975. At trial the State presented a prima facie case against Ritter which included his confession. (The testimony of each witness is outlined in the original opinion of the Court of Criminal Appeals, Evans and Ritter v. State, 361 So. 2d 654 (Ala. Crim. App. 1977). After the State rested, Ritter himself took the stand and detailed the robbery and killing. (His statement is set out in full in the opinion by the Court of Criminal Appeals noted above. 361 So. 2d at 660-661). Although Ritter initially refused to say who fired the shot that killed Nassar, it was apparent at trial from both the State's evidence and the testimony of Evans that it was Evans, not Ritter, who actually fired the fatal shot. In this regard Ritter testified that his gun was loaded and that

he would have killed Nassar if he had had an opportunity, but "John [Evans] was in my line of fire . . . I was there in case he missed." Ritter further stated, "We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We did kill him, so, really, the only thing you can come back with is the death penalty."

Following closing arguments the trial judge charged the jury. No objections were made to the charge. The jury found Ritter "guilty as charged in the indictment" and fixed his punishment at death by electrocution. The trial judge subsequently conducted a sentencing hearing as required by §§ 13-11-3 and 13-11-4, Code 1975, and entered findings of fact regarding the aggravating and mitigating circumstances listed in

§§ 13-11-6 and 13-11-7, Code 1975. In his findings of fact the trial judge noted that, ". . . while Mr. Wayne Eugene Ritter was an accomplice in the Capital Felony committed by another person, his participation was not relatively minor,and by Mr. Ritter's own statement, he was prepared to shoot Edward A. Nassar, deceased, but could not fire because his accomplice, John L. Evans, III, was in his line of fire." The trial judge then "accepted" the death penalty as fixed by the jury.

FELONY MURDER V. ACCOMPLICE LIABILITY

The first issue presented for our consideration is whether or not the jury was allowed to supply the requisite intent under the capital felony statute through the use of the felony-murder doctrine. § 13-11-2(b), Code 1975, specifically states: "Evidence of intent under this

section shall not be supplied by the felony-murder doctrine." The felony-murder doctrine provides that when a homicide is committed in the course of or during an attempt to commit certain felonies which are inherently dangerous to life, the intent which must be shown to support a conviction for murder (variously described as malice aforethought, the specific intent to take life, or a willful, deliberate, malicious, and premeditated killing) is supplied by the criminal intent involved in the underlying felony. Under the doctrine it is not necessary that the individual accused of murder should have contemplated, intended, or willed the death of the victim. Hardley v. State, 202 Ala. 24, 79 So. 362 (1918); Kilgore v. State, 74 Ala. 1 (1883); Mitchell v. State, 60 Ala. 26 (1877): Fields v. State, 52 Ala. 348 (1875). Culpability stems instead from

the accused's participation in an inherently dangerous felony--one in which he should have known that there was a substantial possibility that someone would be killed. In this state felony-murder is statutorily classified as murder in the first degree, § 13-1-70, Code 1975, a crime punishable by life imprisonment. § 13-1-74, Code 1975.

The felony-murder doctrine has been severely criticized, primarily because in a variety of fact situations it often operates to charge an individual with first degree murder when the accused did not have the required intent for murder or when the homicide was the result of the actions of a third party over whom the accused had little or no control. See e.g. W. LaFave & A. Scott, Criminal Law 545-561 (1972); Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous.L.Rev. 356,

365-371 (1978); Comment, Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule, 46 Miss.L.J. 1921 (1975). The doctrine has been eliminated from the Model Penal Code, which instead provides for a rebuttable presumption of extreme recklessness when a homicide occurs in the course of certain felonies. Model Penal Code § 210.2 (Proposed Official Draft, 1962). See also Model Penal Code § 201.2, Comments, para. 4 at 33 (Tent. Draft No. 9, 1959). The use of the felony-murder doctrine is considered particularly harsh in the capital punishment context, where constitutional safeguards and public attitudes demand that the extreme penalty be meted out only for the most reprehensible crimes. As one commentator has observed, "[T]he death penalty is an untenable sanction for negligent or accidental homicide." 15 Hous.L.Rev.

supra at 381. It was, no doubt, this dissatisfaction with the doctrine which led our legislature to prohibit its use in the trial of capital felonies in § 13-11-2(b).

The legislature did, however, indicate that an accomplice in a capital felony could be sentenced to death under our statute, for it included accomplice liability as a factor to be considered during the sentencing hearing under both aggravating circumstances, § 13-11-6(4), and mitigating circumstances, § 13-11-7(4). The significant distinction between use of the felony-murder doctrine and use of accomplice liability in this context is that accomplice liability requires a greater showing of the defendant's individual intent. Under Alabama law, in order to hold an individual as an accomplice the State must prove that he aided and abetted in the

crime, terms which "'comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.'" Jones v. State, 174 Ala. 53, 57 So. 31 (1911). As we noted in Jones, key elements of accomplice liability are encouragement or presence "with a view to render aid should it become necessary." When liability is predicated on the latter it is essential that the principal be aware of the accomplice's support and willingness to lend assistance. Jones, supra. Thus an accomplice, while he may not have actually committed the crime by delivering the blow or firing the shot, has sanctioned and facilitated the crime so that his culpability is comparable to that of the principal. In Alabama, as in many states, this premise is statutorily recognized in § 13-9-1 which abolished

the old common law distinctions among accessories before the fact, principals in the second degree, and principals in the first degree and provides that ". . . all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals . . .."

From the foregoing it is clear that the felony-murder doctrine was not used in this trial. (Indeed, it was never even mentioned.) Instead Ritter could be convicted and sentenced to death under our capital felony statute as an accomplice in the intentional killing of Nassar. (There was also evidence from which the jury could have found that Ritter, aside from his status as an accomplice, had the particularized intent to kill. Of course, it is not contended that Ritter is not

fully liable as a principal for the robbery.) The question then becomes, did the State prove that Ritter was an accomplice to the intentional killing? We think that it did. Through Ritter's confession and again through his voluntary statements at trial the State showed that Ritter and Evans had a prior agreement that anyone who attempted to go for a gun would be killed. This possibility was discussed beforehand and planned for. As Ritter himself stated, the only reason he did not shoot Nassar himself was because Evans was in the way. Clearly Ritter encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necessary.

The further point is raised in this appeal that the trial judge did not properly charge the jury on the law of accomplices. Apparently at the State's

request the trial judge charged, "The law is that anyone who aids or abets in the commission of an offense must be indicted, tried, and punished as if he were the principal." The defendant did not offer any charges or object to the charge as given. Admittedly, the charge was brief and should have preferably included some explanation of the terms "aid" and "abet." Nevertheless, we believe that, for the same reasons stated below in reference to the robbery charge, any error did not adversely affect Ritter's substantial rights and was knowingly waived by Ritter.

Ritter also contends that the death penalty is a disproportionate sentence in light of his involvement in the capital felony and therefore violates the Eighth and Fourteenth Amendments. Ritter attempts to bolster his position by portraying himself as a mere accomplice to the robbery, "a minor participant" in a

crime which led to a killing by someone else. The record, however, refutes this description of Ritter's part in the crime at every point. It was Ritter, not Evans, who asked to see a .38 caliber Colt revolver, who began to load it with ammunition he had brought with him specifically for this purpose, and who carried the revolver out of the pawn shop after Nassar was shot. Thus Ritter could not seriously be considered a "minor participant" in the robbery, and, as we have noted above, he was clearly an accomplice to the killing.

With this more accurate description of Ritter's participation in the intentional killing and robbery in mind we must consider whether the death penalty is a disproportionate sentence for an accomplice to the killing. This is a question which has not yet been decided by the United States Supreme Court, although

several cases before that Court have raised the issue. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Bell v. Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). In each of these cases the Court reversed on other grounds and did not reach the issue of disproportionality. While we opine that there may be situations where an accomplice's participation is so minor that the death penalty would be constitutionally impermissible, such is not the case here. As the trial judge stated, Ritter's participation was not relatively minor. The Court of Criminal Appeals agreed, and so do we. Ritter stands at the most culpable end of the spectrum of accomplice liability. He is closer to an individual who fires a non-fatal shot in a killing rather than

one who waits outside as a lookout. By Ritter's own statement it was mere fortuity which made John Evans the triggerman and not Ritter. Consequently, we see no constitutional infirmity in imposing the death sentence in this case.

THE ROBBERY CHARGE

By way of supplemental brief Ritter asserts that the trial judge committed reversible error by failing to charge the jury on the elements of robbery. In Clements v. State, 370 So. 2d 723 (Ala. 1979), we noted that an instruction on the elements of robbery must be given when a defendant is charged under 13-11-2(a)(2), as was Ritter. It is undisputed that no charge explaining robbery was given to the jury here.

Such an omission does not, however, lead to a reversal in this case. Rule 39(k), ARCP, now provides:

"In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner. (Amended 10-2-78, eff. 12-1-78.)"

In the instant case it is abundantly clear that no injury resulted from the trial judge's omission. Under the circumstances, the possibility of any injury to Ritter from the incomplete charge is eliminated by his earlier plea of guilty.

In this regard we note that Ritter's guilty plea was without doubt knowingly

and voluntarily entered. Prior to his arraignment Ritter filed a "motion of intent to enter guilty plea" which, among other matters, asserted, "That the defendant has openly and publicly admitted his guilt after being advised of his constitutional rights numerous times, and still admits his guilt as charged in both indictments." At his arraignment Ritter was advised of his rights under both the United States Constitution and state law. Indeed, the colloquy among the trial judge, the attorneys, and Ritter himself was extremely thorough and demonstrates that the trial judge as well as Ritter's attorney made every effort to assure that Ritter understood the benefits of a jury trial which would be forfeited by a plea of guilty. Nevertheless, against the advice of his attorney, Ritter entered a guilty plea to the robbery and intentional killing of Nassar. (He also pled guilty

to the robbery of a Radio Shack in Mobile.) The trial judge, however, did not accept the guilty plea but instead set the matter for presentation to a jury. At the trial the State presented its case in considerable detail and showed each of the elements of robbery, all of which were admitted by Ritter on the witness stand. Thus Ritter, after having entered a guilty plea, had the additional benefit of a full jury trial as well.

We also decline to reverse this case on the basis of any omissions in the charge because it is apparent that Ritter knowingly and voluntarily waived any errors in the charge. That such a waiver may take place goes without saying, since defendants are regularly allowed to waive the entire panoply of constitutional rights, as well as those accorded under state law. (In fact, in the present case Ritter waived a challenge to the make-up

of the grand and petit juries which had previously been declared unconstitutional by the United States District Court.) Here Ritter voluntarily maintained a course of assisting the State in proving its case, even to the point of telling the jury himself from the witness stand, "the only thing you can come back with is the death penalty." Consequently, we can only conclude that his failure to object to the charge, to present proposed charges, or otherwise to bring any omissions in the charge to the court's attention was a calculated decision on the part of Ritter himself, and not an oversight on the part of his attorney. To grant a reversal now, under these circumstances, on the basis of the charge would be a travesty of justice and would simply invite defendants to ignore errors during a trial in the hopes that, if convicted and reversed on appeal, a second jury would be more lenient.

For the foregoing reasons petitioner's conviction and sentence of death is affirmed.

AFFIRMED.

TORBERT, C. J., and BLOODWORTH, MADDOX, JONES, ALMON, SHORES and EMBRY, JJ., concur.

BEATTY, J., dissents.

BEATTY, Justice (dissenting):

I adhere to the views expressed in my dissent in Evans v. State, Ala., 361 So. 2d 666 (1978).

APPENDIX I

JUN 23 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

1 Div. 837

Wayne Eugene Ritter, alias

v.

State of Alabama

Appeal from Mobile Circuit Court

AFTER REMAND BY THE SUPREME COURT OF ALABAMA

TYSON, JUDGE

The prior opinions in this case are reported as Evans and Ritter v. State, 361 So. 2d 654 (1977), and Ritter v. State, 375 So. 2d 266 (1978), affirmed 375 So. 2d 270 (1979).

On mandate of the Supreme Court of Alabama in Ritter v. State, 77-798, Alabama Supreme Court, May 8, 1981, rehearing denied June 12, 1981, and authorities cited therein, this cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

All the Judges concur.

APPENDIX J

JUNE 23 1981

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1980-81

6 Div. 561

Recardo Cook

v.

State

Appeal from Jefferson Circuit Court

DeCARLO, JUDGE

This is an appeal from a denial of a petition for coram nobis and it is submitted to this court for review on briefs and oral argument.

Recardo Cook was originally tried and convicted under the old capital punishment

act, (prior to Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Cook was found guilty and the jury sentenced him to death. The punishment was later changed by the trial judge to life without parole. He is now before this court arguing that his petition for coram nobis should have been granted so that he could have the benefit of the "third option," to have the jury charged on the lesser degrees of homicide as mandated in Beck v. Alabama, supra.

The State has argued that the evidence in the petition in this case did not warrant an instruction on a lesser included offense, because petitioner asserted an alibi defense and did not present any evidence tending to prove a lesser offense.

The Alabama Supreme Court has reversed and remanded Ex parte Wayne

Eugene Ritter, Ala. S. Ct. Ms. 77-798 (May 8, 1981), for a new trial on authority of Beck v. Alabama, supra. The Ritter transcript contained no evidence of a lesser included offense because Ritter pleaded guilty to the capital offense. Justice Jones' opinion, concurring in part and dissenting in part, stated:

> "The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered."

See also Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980). In our judgment, every pre-Beck death case must be reversed, regardless of the lack of evidence on lesser offenses. The following quote from Evans v. Britton, supra, illustrates the problem with all pre-Beck cases:

> "The State says that harm to Evans is sheer speculation because he did not even undertake

> to prove a lesser offense. It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense."

Therefore, the order of the Jefferson Circuit Court denying the petition for error coram nobis is hereby reversed and remanded on the mandate of Beck v. Alabama, supra, and Beck v. State, 7 Div. 560, Ala. S. Ct. Ms. 77-530 (December, 1980) as modified.

REVERSED AND REMANDED.

Harris, P.J., Tyson, J., concur, Bookout, Bowen, J.J., dissent.

BOOKOUT, J., dissenting:

Beck and Ritter, supra, were both cases where the death penalty was imposed. I would not extend the rationale of those

opinions to apply to a case where the death penalty was not imposed. The United States Supreme Court applies a higher standard of review to death cases than to those where only imprisonment is imposed, and I respectfully refuse to extend their Beck decision beyond the bounds of the issues decided. Until that court or the Alabama Supreme Court rules directly on the issue in this non-capital case, I must disagree with my brethren in their instant application of Beck and Ritter.

Bowen, J., joins in dissent.

Opposition

SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-247 Corrected Copy

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI;
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. CARROLL
1001 South Hull Street
Montgomery, AL 36104

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-247

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI;
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Wayne Eugene Ritter, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Supreme Court of Alabama in this case.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

1. THE DECISION BELOW RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

In the fourteen months following this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), the Alabama Supreme Court has attempted to resolve the state and federal issues which arose out of this Court's decision. It has resolved those issues in three principal decisions, Beck v. State, 396 So.2d 645 (Ala. 1981); Ritter v. State, No. 77-798 (Ala. May 8, 1981), extended on rehearing (Ala. June 12, 1981) and Reed v. State,

79-560 (Ala. August 28, 1981)(On Application for Rehearing.) An analysis of those three decisions amply demonstrates that the decision of the court below, reversing respondent's conviction, rests on an independent and adequate state ground.

In Beck v. State, supra, the Alabama Supreme Court assessed the impact of this Court's Beck v. Alabama decision on the state's 1975 death penalty law. The Court, using state law doctrine, severed the lesser included offense preclusion section, see Beck v. Alabama, 65 L.Ed.2d at 403, of the death penalty statute and ruled that the state law concerning lesser included offenses which had previously applied to noncapital defendants would also apply to capital defendants as well. Beck v. State, supra at 660. The Court then construed the death penalty law's mandatory death sentence provision, see Beck v. Alabama, 65 L.Ed. 2d at 406, to make the trial jury the sentencing authority and to permit them to consider aggravating and mitigating circumstances. Beck v. State, supra at 662-664.

Following the Alabama Supreme Court's opinion in Beck, the state court considered respondent's case. Respondent's counsel argued both state and federal issues as grounds for reversal.[1] In its initial opinion, the State Supreme Court reversed respondent's conviction on the authority of this Court's opinion in Beck v. Alabama, supra and its own opinion in Beck v. State, supra. On rehearing, the Court extended the opinion by stating:

> We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, ___ F.2d ___ [March 19, 1981] (1981) which involves Ritter's partner in this crime.

Pet. App. p. 3a - 4a.

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[1] Respondent's counsel argued that this Court's decision in Beck v. Alabama, supra, mandated a reversal of his case on federal constitutional grounds regardless of the existence in the trial record of possible lesser included offenses. See Memorandum in Opposition to the Application of the State of Alabama for Stay, (hereinafter cited as Opposition to Stay), App. A. He also argued that under state law respondent was entitled to the lesser included offense charge of felony murder. Opposition to Stay, App. B

The Court retained, however, the language from its original opinion which reversed respondent's conviction on the authority of Beck v. Alabama, and Beck v. State. After the Alabama Supreme Court issued its extended opinion in respondent's case, this Court granted certiorari in Britton v. Evans, now Hopper v. Evans, No. 80-1714 (Cert. granted June 22, 1981). The State sought a stay of judgment from the State Supreme Court in respondent's case based on this Court's action in Britton. The application for stay was denied.[2]

The petitioner and respondent obviously disagree as to whether the decision below rests on an independent and adequate state ground. Petitioner argues that the extended opinion makes clear that the decision rests solely on federal grounds, see Pet. pp. 36-37, while respondent argues that the court's reliance on Beck v. State indicates that a state ground is involved. See Opposition to Stay, pp. 2-3. This dispute has, for all intents and purposes, been resolved by the Alabama Supreme Court through its actions in capital cases, post-Ritter.

Even though the Alabama Supreme Court has been informed, repeatedly, that this Court has granted certiorari in Britton v. Evans, and asked to retreat from its opinion in Ritter. See State's Motion for Stay of Mandate, Opposition to Stay, Appendix E, it has continued to take action in other death penalty cases based on its opinion in Ritter. On August 28, 1981, it cleared its docket of death penalty cases by remanding the cases to the Court of Criminal Appeals for consideration

> ... in light of Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1980) and this Court's decisions in Beck v. State; Ritter v. State and Reed v. State (Citations omitted),

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[2]An application for stay was filed with Justice Powell who also denied the stay application.

Baldwin v. State, 78-127 (Ala. August 28, 1981) (a copy of the opinion is attached hereto as Appendix A.)[3] See also, Hubbard v. State, 78-688 (Ala. August 28, 1981) (Reversing the judgment of the Court of Criminal Appeals on the authority of Beck v. Alabama, Beck v. State, Ritter v. State, and Reed v. State) (a copy of the opinion is attached hereto As Appendix B).

The fact that the Supreme Court of Alabama continues to rely on its Ritter opinion, particularly after this Court granted certiorari review in Britton v. Evans, constitutes a strong statement by that court that its decision in this case rests on state law grounds. The opinion in Reed v. State, No. 79-560 (Ala. August 28, 1981) is particularly instructive. A copy of the opinion is attached hereto as Appendix C.

In Reed, the State requested a stay of mandate on the grounds that this Court has granted cert. in Britton v. Evans, supra, and argued that mandate of the Alabama Supreme Court should await the outcome of Britton v. Evans, in this Court. App. C. p 1-2. The Alabama Supreme Court specifically rejected that contention stating that it did not "consider the United States Supreme Court review of Evans v. Britton, supra, as a compelling reason to delay the mandate." App. C. p. 3. In rejecting the State's request, the Court noted that its decision to reverse the convictions of individual defendants, like respondent, because of the existence of the lesser offense preclusion in the 1975 death penalty law represented an

> adherence to and not departure from the rule requiring the jury instruction on lesser included offenses when such a charge is warranted by the evidence.

App. C. p. 3.

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[3]The Court disposed of 14 cases on August 28, 1981. Of those, 8 were cases on remand from this Court, --Williamson v. State; Baldwin v. State; Wilson v. State; Horsley v. State; Cade v. State; Coon v. State; Mack v. State; Crawford v. State. The other remanded cases had previously been reversed. Beck v. State, Ritter v. State; Thomas v. State, 78-490 (Ala. April 10, 1981).

Reed clearly illuminates the Court's decision in this case and counters the argument of the State that the Alabama Supreme Court felt compelled by Beck v. Alabama to reverse respondent's conviction. Quite the contrary, Reed demonstrates that the Alabama Supreme Court has anchored its decision to reverse respondent's conviction in its own interpretation of the requirements of the state lesser included offense law. The Court clearly shows in Reed that reversals in cases like respondent's are required as a necessary concomitant of the state law doctrine which mandates evidentially supported lesser included offense charges. The existence or non-existence of evidence of lesser included offenses in the trial record is immaterial. As the Court notes in Reed, the 1975 law did not allow jury instructions on lesser included offenses,

> Hence any offer of evidence thereof or any plea based thereon, would have been irrelevant and impermissible at trial under that statute, App. C. p. 2.

Because of that deficiency, new trials have been ordered because adherence to state law requires that persons like respondent be "afforded the opportunity to proffer evidence of lesser included offenses." App. C. p. 2-3.

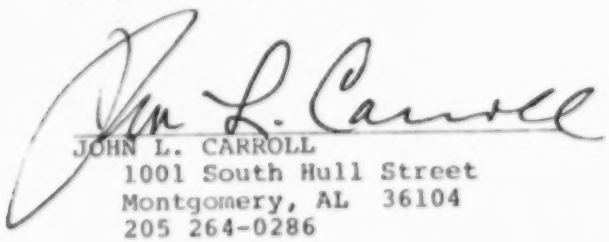
It may be that this Court's decision in Beck v. Alabama does not require the results obtained in Ritter v. State, and Reed v. State. However, what Beck v. Alabama requires is no longer the sole relevant inquiry. The Alabama Supreme Court has decided that their interpretation of the state law surrounding a defendant's right to evidentially supported lesser included offense charges entitles all defendants tried under the 1975 law including respondent, to a new trial as a matter of state law. Reed v. State, supra. Under those circumstances, this Court is without jurisdiction to review the reversal of respondent's conviction. Time and time again this Court has recognized that its power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. Herb v. Pitcairn, 324 U.S. 117, 126 (1944). If the judgment of a state court

rests on two grounds, one state and one federal and the state ground is independent and adequate, this Court will not take jurisdiction. Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562, 568 (1977); Lynch v. New York, 293 U.S. 52, 54 (1934). The decision below clearly rests on an independent and adequate state ground.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari chould be denied.

Respectfully submitted,



JOHN L. CARROLL
1001 South Hull Street
Montgomery, AL 36104
205 264-0286

COUNSEL FOR RESPONDENT

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

IN THE MATTER OF

Brian Keith Baldwin

78-127 v.

State of Alabama

After Remand by the United States Supreme Court

PER CURIAM.

The Supreme Court of the United States, on June 30, 1980, issued the following mandate in this cause:

APPENDIX A

ON WRIT OF CERTIORARI to the Supreme Court of Alabama.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause is vacated, and that this cause is remanded to the Supreme Court of Alabama for further consideration in light of Beck v. Alabama, 447 U.S. ___ (1980).

Therefore, pursuant to the mandate of the Supreme Court of the United States, this case is remanded to the Court of Criminal Appeals for consideration in light of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and this Court's decisions in Beck v. State, 396 So. 2d 645 (Ala. 1980); Ritter v. State, [MS. June 12, 1981] ___ So. 2d ___ (Ala. 1981); and Reed v. State, [MS. June 12, 1981], on rehearing, [MS. August 28, 1981] ___ So. 2d ___ (Ala. 1981).

REMANDED WITH DIRECTIONS.

All Justices concur, except Maddox, Jones and Adams, JJ., who concur specially.

MADDOX, JONES, AND ADAMS, JJ. (Concurring specially):

By concurring specially we adhere to the views expressed in our respective opinions in Ritter v. State [MS. June 12, 1981], ___ So. 2d ___ (Ala. 1981), to the effect that we would not reverse the conviction in any case in which the record of trial affirmatively precludes any showing which would entitle the defendant to a jury instruction on a lesser included offense.

Because the per curiam opinion mandates a retrial on the issue of guilt, as well as the issue of sentence, we re-emphasize the proposition that an instruction on a lesser included offense is required "on any lesser included offense supported by the evidence," Beck v. State, 396 So. 2d 645, 657 (Ala. 1980), but an instruction on a lesser included offense would be appropriate only if there was evidence which would support the giving of such an instruction. Roberts v. Louisiana, 428 U. S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976), Beck v. Alabama, 100 S. Ct. 2382, 2386 (footnote 7) (1980).

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 28 day of Aug 19 81

J. O. Sentell
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

Ex parte: J. B. Hubbard

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: J. B. Hubbard, alias, etc.

78-688 v.

State of Alabama)

ON SECOND APPLICATION FOR REHEARING

PER CURIAM.

The judgment rendered pursuant to the opinion of this Court dated March 7, 1980, and the denial of the application for rehearing dated April 4, 1980, both reported at 382 So.

2d 597, are set aside; the judgment of the Court of Criminal Appeals is reversed; and the cause is remanded to the Court of Criminal Appeals on the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); Beck v. State, 396 So. 2d 645 (Ala. 1980); Ritter v. State, [MS. June 12, 1981] ___ So. 2d ___ (Ala. 1981); and Reed v. State, [MS. June 12, 1981], on rehearing [MS. August 28, 1981] ___ So. 2d ___ (Ala. 1981).

REVERSED AND REMANDED.

All Justices concur, except Maddox, Jones and Adams, JJ., who concur specially.

MADDOX, JONES, AND ADAMS, JJ. (Concurring specially):

By concurring specially we adhere to the views expressed in our respective opinions in Ritter v. State [MS. June 12, 1981], ___ So. 2d ___ (Ala. 1981), to the effect that we would not reverse the conviction in any case in which the record of trial affirmatively precludes any showing which would entitle the defendant to a jury instruction on a lesser included offense.

Because the per curiam opinion mandates a retrial on the issue of guilt, as well as the issue of sentence, we re-emphasize the proposition that an instruction on a lesser included offense is required "on any lesser included offense supported by the evidence," Beck v. State, 396 So. 2d 645, 657 (Ala. 1980), but an instruction on a lesser included offense would be appropriate only if there was evidence which would support the giving of such an instruction. Roberts v. Louisiana, 428 U. S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976), Beck v. Alabama, 100 S. Ct. 2382, 2386 (footnote 7) (1980).

AUG 2 8 1981

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM - 1981

Ex parte: Ricky Louis Reed

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

Re: Ricky Louis Reed

v.

State of Alabama)

79-560

Ex parte: State of Alabama,
ex rel. Attorney General

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Ricky Louis Reed

v.

State of Alabama)

79-561

ON APPLICATION FOR REHEARING

BEATTY, JUSTICE.

The State of Alabama urges this Court to stay its mandate of a new trial for the defendant. The ground

advanced is that, because the United States Supreme Court has granted certiorari in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), op. ex. 639 F. 2d 221 (5th Cir. 1981) and will review that decision in accord with its own decision rendered in Beck v. Alabama, 447 U. S. 625 (1980), our own mandate should await that outcome.

We must point out that following the United States Supreme Court's decision in Beck v. Alabama, supra, we construed the applicable death penalty statute to require bifurcated proceedings for conviction and sentencing. Beck v. State, Ala., 396 So. 2d 645, 662 (1981). We also recognized the well-established Alabama statutory and common law rule requiring jury instructions on lesser included offenses supported by the evidence, and we acknowledged the requirement of applying that rule in future capital cases. Beck v. State, supra, at 657.

A majority of this Court, however, also recognized that the death penalty statute applicable to Beck, because of its preclusion clause, did not allow jury instructions on lesser included offenses. Hence, any offer of evidence thereof, or any plea based thereon, would have been irrelevant and impermissible at trial under that statute. Accordingly, the cases of persons tried and convicted under Code of 1975, § 13-11-1 to -9, as construed in Beck v. State, supra, have been remanded for new trials on the merits in order to afford them the opportunity to proffer evidence of lesser included offenses.

Beck v. Alabama, supra; Beck v. State, supra. That result, of course, represents adherence to, not departure from, the rule requiring the jury instruction on lesser included offenses when such a charge is warranted by the evidence. For these reasons, we do not consider the United States Supreme Court's review of Evans v. Britton, supra, as a compelling reason to delay the mandate in this case.

OPINION EXTENDED; APPLICATION FOR REHEARING OVERRULED.

Torbert, C. J., Faulkner, Almon, Shores, and Embry, JJ., concur.

Maddox and Adams, JJ., concur specially.

Jones, J., concurs in the result to remand.

79-560

Ricky Louis Reed

MADDOX, J. (Concurring specially).

I concur in the judgment which denies the State's request to stay the mandate of a new trial for the defendant Reed on the ground that the Supreme Court of the United States has granted certiorari in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), op. ex. 639 F. 2d 221 (5th Cir. 1981). I also concur in the judgment that Reed is entitled to a new trial under the decision of the United States Supreme Court in Beck v. Alabama, 447 U. S. 625 (1980). I have reviewed the facts of this case as set out in the opinion of the Court of Criminal Appeals, and I am convinced that this case is unlike that of Ritter v. State, [Ms. June 12, 1981], ____ So. 2d ____ (Ala. 1981) (Maddox, Jones and Adams, JJ., dissenting). If this case involved a situation where there was no evidence of a lesser included offense, I would agree to stay the mandate until the Supreme Court of the United States decides Evans v. Britton, supra.

I file this special concurrence to make one further point concerning the majority opinion. In the opinion, the majority states:

> A majority of this Court, however, also recognized that the death penalty statute applicable to Beck, because of its preclusion clause, did not allow jury instructions on lesser included offenses. Hence, any offer of evidence thereof, or any plea based thereon, would have been irrelevant and impermissible at trial under that statute. Accordingly, the cases of persons tried and convicted under Code of 1975, § 13-11-1 to -9, as construed in Beck v. State, supra, have been remanded for new trials on the merits in order to afford them the opportunity to proffer evidence of lesser included offenses. [Emphasis added.]

If the majority holds that persons tried and convicted under Code 1975, § 13-11-1 to -9, were absolutely prohibited from offering any evidence of a lesser included offense, I think the majority errs. I think that Reed, on his plea of not guilty,

was not precluded from introducing evidence that he may have been guilty of some lesser included offense, thereby showing that he was not guilty of the capital offense. In fact, under the death penalty statute, with the preclusion clause in effect, a defendant, such as Reed, if he successfully proved he was guilty of a lesser included offense, could have been acquitted, because the jury had to be convinced that he was guilty of the capital offense or nothing.

Adams, J., concurs.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-247

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Wayne Eugene Ritter, by his undersigned counsel, asks leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the Petitioner, who is in the custody of the State of Alabama at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Ritter's affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

Respectfully sumbitted,

JOHN L. CARROLL
1001 South Hull Street
Montgomery, AL 36104
205/264-0286

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-247

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

AFFIDAVIT

STATE OF ALABAMA)
COUNTY OF MONTGOMERY)

JOHN L. CARROLL, being duly sworn, states:

1. I am counsel to Wayne Eugene Ritter in Alabama v. Ritter, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Ritter's motion for leave to proceed in forma pauperis. My representation of Mr. Ritter is without renumeration.

2. Mr. Ritter is presently in the custody of the State of Alabama and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Ritter by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Ritter is attached hereto.

3. Respondent had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Ritter is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Ritter is entitled to redress in this cause for the reason that his conviction and sentence of

death were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

John L. Carroll
JOHN L. CARROLL

Sworn to and subscribed before me, this 10th day of September, 1981.

Lillie L. Bryan
Notary Public

My Commission Expires: 11/1/81

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-247

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent.

AFFIDAVIT

STATE OF ALABAMA)
COUNTY OF)

I, Wayne Eugene Ritter, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration on my present appeal.

5. I believe that I am entitled to the redress I seek in said cause.

Wayne Eugene Ritter
WAYNE EUGENE RITTER

Sworn to and subscribed before me this 21 day of September, 1981.

Eddie Sanders
NOTARY PUBLIC
My Commission Expires: 5-13-85